

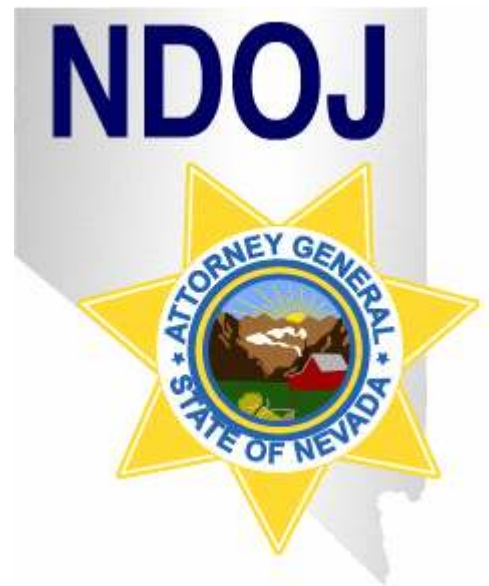
NEVADA

BOARD AND COMMISSION

MANUAL

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Nevada Department of Justice
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A MESSAGE FROM THE ATTORNEY GENERAL

The purpose of this manual is to provide some orientation to individuals who are appointed to serve on a state regulatory board or commission. I believe it is important to provide an orientation because most board members earn their livelihood in the private sector. They may not be familiar with state government and the laws and other matters that relate to the functioning of boards and commissions, and are also not familiar with guidelines under which board members should operate. Additionally, in many instances, board and commission members do not have full-time professional staff to assist them.

This manual is not intended to answer every question or address every matter that you may face as a board or commission member. It is intended to give you basic knowledge regarding operation of most boards and commissions. Based on your experience as a member of a board or commission, you may very well have comments or suggestions to improve the manual for future editions. This office welcomes your input.

As is made clear throughout the manual, boards and commissions do have a variety of resources available to them. For example, the state Budget Division may be able to provide assistance with regard to financial or budgetary matters. Board and commission members should never hesitate to rely on such resources or their legal counsel whenever the prospect presents itself.

George J. Chanos
Attorney General of Nevada

I. BOARD AND COMMISSION FUNCTIONS

As a member of a board or commission, you are part of the executive branch of Nevada's state government. In general, the function of the executive branch of government is to carry out or enforce laws enacted by the state legislature. The function of a board or commission is to carry out or enforce the laws that pertain to its particular jurisdiction. A board or commission only has the jurisdiction (in other words, the power and authority) to determine issues which fall under the board's enabling statutes.

The purpose of professional licensing is to protect the health, safety, and welfare of the public by assessing minimum educational and experience requirements for initial entry into a profession, and by enforcing laws and regulations to rid the profession of incompetent and unethical practitioners.

In general, boards and commissions approve licensing examinations, issue licenses, and regulate the profession by enforcing statutes and regulations.

Statutes and regulations are enacted to protect the general public or some specific identifiable sector of the public. It is important for you, as a member of a board or commission, to keep in mind the primary purpose of your board or commission, particularly in light of the fact that this purpose may sometime be at odds with the interests of the industry or profession in which you earn your livelihood. Being a board member may often be a difficult job, and you may be called upon to make difficult decisions.

To better understand the purpose and function of your board or commission, you should be familiar with the practice act establishing your authority. Virtually every board and commission is governed by a specific chapter of the Nevada Revised Statutes (NRS). Typically, a practice act pertaining to a board or commission contains the following:

- A. Provisions identifying the purpose of the board or commission and establishing its general powers, membership selection, tenure, and operation. It is important to remember that, as a legislatively created agency, the power of a board or commission is limited. It may only do that which is set forth in, or can be *reasonably implied from, the pertinent statute*.
- B. Provisions defining the profession, business, or trade under the board's or commission's jurisdiction.
- C. Provisions governing the licensing and disciplinary functions of the board or commission.

A practice act will also commonly contain provisions authorizing the board or commission to adopt administrative regulations. Such regulations are

contained in the Nevada Administrative Code (NAC). Like the NRS, the NAC is organized by numbered chapters. NAC chapter numbers will correspond to the appropriate statute numbers. Regulations contained in the NAC apply with the same force of law as the statutes, and thus should be scrupulously followed except in those cases where they are in direct conflict with statutory provisions. If such a conflict exists, the statute controls.

II. THE ROLE OF THE BOARD OR COMMISSION MEMBER

- A. Board and commission members are normally appointed by the governor although in a few instances they may be appointed by another state official, such as the head of a state agency.

The primary function of a board or commission member is to ensure that the public health, safety, and welfare is protected. All decisions that are made must come from that purpose, whether on a matter of registration, examination, licensure, or performance by a licensed professional. ***The interests of the profession and the professional must be subordinate to the interests of the public.***

- B. If you are appointed to a board or commission, you will receive four items from the appointing official along with instructions for handling these items:

- * A document, often called a Commission, declaring your appointment and your tenure;
- * An oath of office which you must sign before a notary and return to the Governor's office for filing;
- * A financial disclosure form which you must complete and file with the Ethics Commission; and
- * A biographical questionnaire which you will be requested to complete and return.

- C. Board members have responsibilities to the following groups:

- * The General Public.

The public has an expectation of fair dealing with the profession as a whole and trusts that licensees will be qualified to perform properly and safely. It anticipates that a fair method will be provided to settle disputes that may arise from its dealings with the profession. It has a right to know what is happening within the board and how the board justifies the action it takes.

- * Potential Licensees.

A person who wishes to earn his or her living in an occupation should not be kept out unreasonably. That

person should also have easy access to all information about entering the profession, including testing, and/or transferring a license to or from another state.

* Other Board Members.

Each board member has the responsibility to listen to other board members and to consider their views and contributions. Each member is responsible for helping to determine good policy and procedures for contributing to fair determinations of problems, and for helping the board operate efficiently and effectively.

D. Consumer rights.

The following consumer rights should be kept in mind when making board decisions:

- * The right to *safety*; to be protected from products and services that are hazardous to health or to life.
- * The right to be *informed*; to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts needed to make choices.
- * The right to *choose*; to have available a variety of products and services at competitive prices, and assurance of satisfactory quality and service.
- * The right to be *heard*; to be assured the consumer interest will receive full and sympathetic consideration in making government policy, both through laws passed by the legislature and regulations passed by administrative agencies.
- * The right to *education*; to have access to programs and information to help consumers make better marketplace decisions.
- * The right to *redress*; to have problems corrected and to be assured of competent and professional service and products.

E. Criteria for board membership.

The criteria for professional/occupational members on each board are set by the statutes establishing authority of the board. The standards promulgated by the enabling statute ensure members are capable of making expert technical judgments in a specialized field.

The public members on a licensing board are there to express and be watchful of the public interest, not the interest of the professional occupation. Public members are not expected to be and are not supposed to be technically expert or experienced in the licensing occupation.

The following requirements apply to all board members:

- * Demonstrated interest in public service.
- * Common sense regarding policies and procedures. (Do decisions of the board seem sensible? If not, ask for clarification.)
- * Willingness to ask questions. (If a member is not sure about something and does not ask, he/she is not being responsible.)
- * Commitment to attendance. (Consistent attendance is essential to keep informed about what is going on and to give continuing direction and support. An individual who accepts appointment to a board and does not take seriously the duty to be there regularly and actively does a disservice to the board and to the public.)
- * Consideration. Respect each member's rights and opinions, as well as the rights and opinions of others.

F. The following restrictions apply to board members:

- * A board member should not use his or her position outside of a board meeting to represent that he/she has any decision making powers, because decisions are made only with the board as a whole.
- * All inquiries within the purview of the board should be directed to the board office so they can be brought to the attention of the board at a duly noticed meeting. (Proper notice of all meetings must be given in compliance with the Open Meeting Law; see Open Meeting Law Manual.)
- * Details of board activity should not be released by a board member unless and until it becomes part of the public record. Some investigative procedures which may conclude in formal hearings or conferences may be confidential and not a part of the public record. Thus, any disclosure of such information should be made only after consultation with legal counsel to the board.

- * Board members are prohibited from participation in *ex parte* discussions concerning quasi-judicial proceedings before the board. This means they cannot participate in private discussions on behalf of one party in the absence of the other parties to the dispute. Board members cannot discuss the details of a disciplinary action with the subject of the complaint or with any other members of the board except at a board meeting or in the context of an investigative proceeding. Any board member who participates in an investigation is unable to sit on the board in an adjudicative capacity with the subject of the investigation.

G. Board performance of the public member.

Most boards require appointment of a public member who is not a member of the occupation or profession that is being regulated.

Several strategies may be used to increase public member effectiveness. These strategies will help public members feel comfortable in their role, maintain a positive attitude, and ensure fulfillment of their public trust:

- * Ask questions. As a public member, one is not expected to know everything the professional members of the board know. When policy is discussed or deliberations are held on decisions, these are key moments for public members to ask questions to facilitate their learning.
- * Committees. Boards may have standard committees to facilitate the work of the board. Volunteer to be appointed to a standing committee. Serving on special or ad hoc committees can also enable a public member to develop expertise in important areas of the board.
- * Standing Committees are formed to perform an ongoing, continuous function and usually operate on an annual or specified term basis. Usually, the chairman is included and often the members are elected to these committees.
- * Special Ad Hoc Committees are formed to accomplish specific objectives or tasks. They are usually appointed by the chairman to meet for a limited number of times and for a specific purpose. When that purpose is fulfilled, the committee is disbanded and dismissed.
- * Read. The public member should ask for information regarding board policies, procedures, and business activities that have been reduced to writing. Reading information prior to the board meeting

is essential. Thorough preparation will enhance the ability to actively participate in board meetings.

- * Request Information. When new matters are discussed, request agency information that has been previously written and is available on that topic.
- * Know the law and regulations. Licensing acts and implementing regulations are continually revised and updated. Manuals of applicable law for the particular board, as well as manuals on the Open Meeting Law and Public Records Law, are provided to board members. A public member can never expect to be a pro-active member if the key licensing provisions which govern activities for the board are not understood.
- * Maintain a focus. Adequate preparation is 75 percent of any effective activity. Being a public member on the board requires learning new things.
- * Attitude. The public member's perception of himself or herself in relation to other members of the board is critical to success as a board member. A public member's contribution is significant and important. Those viewpoints are crucial and will affect deliberations of the board. On the other hand, if some of the ideas or suggestions are not acted upon, it does not mean that the public member is not a necessary part of functioning of the board.
- * Active Participation. Passivity breeds inactivity. Rather than reacting to what occurs, be pro-active in thinking. Asking appropriate questions, requesting important information, and participating in board discussions will benefit the board member.

III. BOARD AND COMMISSION STRUCTURE AND OPERATION

A. General.

Boards and commissions are normally required by statute to meet a minimum number of times per year. As discussed more fully in the Open Meeting Law section, as well as the Open Meeting Law Manual, proper notice of such meetings must be given.

Each statute sets out quorum requirements for the board. In most cases, the majority of the appointed membership of a profession or occupational board constitutes a quorum for the purpose of conducting business. Although boards and commissions are generally not required to do so, they may establish subcommittees to be responsible for or to make recommendations on certain matters or subjects such as personnel, finance, and continuing education.

It should be kept in mind, however, that typically there is no statutory authority for a board or commission to delegate its responsibility for making fundamental decisions to subcommittees. If a question arises concerning whether a particular matter can be delegated by the board as a whole, legal counsel should be consulted. In addition, subcommittee meetings may be subject to the Open Meeting Law.

B. Holding effective board meetings.

Some general techniques for holding effective board meetings should be followed. Meeting arrangements should be made by the board administrator or secretary and verified by the chairman. These may include:

Announcing the date, time, and place of the meeting well in advance. Notify members and interested persons who have requested notice.

Scheduling a comfortable, noise-free private room or space for the meeting.

The room should be neither too small nor too large for the group.

It should have proper ventilation and temperature control.

It should have proper acoustics and no visual barriers.

The chairman should be in a position so that he/she is easily seen and heard by everyone. In a larger or more formal meeting, he/she should have a microphone and/or a lectern.

Other matters of importance may include restroom facilities, meal facilities, parking facilities, elevators, and access for the handicapped.

Depending on availability of resources, as well as statutory authority, a board or commission may have a staff of full- and/or part-time employees. It may, therefore, be advisable to have a written personnel policy that clearly defines duties of each position and spells out the board's or commission's policy with respect to matters such as leave, termination's, etc. In doing so, it should be kept in mind that such policies which impose duties and responsibilities on employees will often impose reciprocal duties and obligations on the board or commission as an employer. In other words, do not promulgate employment policies unless you intend to follow them. If you do not follow established policies, you may be confronted with confused and disgruntled employees, or even the possibility of a lawsuit.

C. Financial management.

Finances and budget of a board or commission must be managed competently, honestly, and in compliance with state law. If you have any uncertainty regarding how to proceed in the area of budget and finances, you should not hesitate to seek assistance from your legal counsel or the analyst within the Budget Division of the Department of Administration who is assigned to your board or commission.

It is likely that your board or commission is not a state general fund agency, which means that your revenue is not appropriated by the legislature from the state's general fund but instead comes from a source such as licensing fees. (If your board or commission is not a general fund agency, it is not part of the state's fiscal management informational reporting system.) If this is the case, your board or commission must submit a quarterly report of revenues and expenditures to the Budget Division of the Department of Administration. At the end of each biennium, an unaudited statement containing the same information must also be

submitted to the Budget Division. In addition, non-general fund boards and commissions must have an independent audit conducted each fiscal year by a public accounting firm. The audit report must be furnished to the Legislative Counsel Bureau auditor and the Budget Division.

As a board or commission member, you should have a basic knowledge of the state's general requirements and guidelines regarding financial and budgetary matters, and be satisfied that your staff is complying with these requirements. In terms of record-keeping and disposition, expenditures must be accounted for and revenues, whether they are derived from licensing fees or administrative fines, must be accounted for and deposited in accordance with the applicable statutory requirements. As a specific example, it is common for a statute to require that fines be deposited with the state treasurer. In particular, every board and commission must adhere to the financial and budget-related requirements set forth in the State Administrative Manual (SAM).

Additionally, each board or commission should have a defined set of written controls for handling cash. If your board or commission handles incoming cash (for example, licensing application or renewal fees), a written procedure should require that the cash or check received be processed immediately. If possible, two individuals should handle incoming revenue with one person opening the mail containing the cash and another person depositing it in the board's or commission's account. Finally, a written record should be kept stating the amount received and its purpose. For example, a check submitted as a license application fee should be so indicated in the written record.

Your board or commission must stay within the budget established by the board or commission and approved by the Budget Division. If, during the biennium, the need arises to deviate from the budget in any manner whatsoever, permission must be given by the Budget Division or the Interim Finance Committee. The procedure involving submission of a written request must be followed to secure such permission. If you have further questions in this regard, contact the Budget Division.

D. Testing/examining.

Boards may have the responsibility of approving a testing program which accurately measures the knowledge, skills, and abilities of the applicants to perform at a minimum level of competency as a licensed practitioner.

A good licensing examination measures an applicant's knowledge of essential aspects of the profession. Devising a good test is a sophisticated skill. Unfortunately, good will and knowledge of the field are not enough. Extensive study and experience are also crucial. Licensing examinations must be fair and easy to understand because they will determine whether someone will be able to earn a livelihood from the profession. Examinations should test the applicant's ability to do the job, not his or her proficiency in English.

Boards should be sensitive to applicants who have problems with English. In some fields, an applicant who does not read or speak English should be provided with an interpreter. For those who have trouble reading or writing, questions might be read aloud, and answers written down or recorded on tape. However, some professions may require proficiency in English as a necessity in performing the job well. Legal counsel should be consulted if there are questions in this area.

Board staff must be sensitive to candidates who fail. Licensing boards should inform candidates of the reason for failure and of weak areas. Allowing applicants to retake tests adds to fairness of the testing process.

E. Licensing.

Most boards have developed policies regarding review and approval of applications for initial licensure. Some boards delegate to administrative staff authority to issue a license in accordance with those policies. The staff then brings only an exception or questionable application to the board for consideration. There are a few boards which insist on board member review of all applications. Once it has been determined that applicants have met their prerequisites for licensure, the board office arranges for printing and issuance of the license. The applicants will then receive a wall certificate, license and, in some cases, a wallet card.

F. Travel, per diem, salary.

In general, board and commission members, as well as staff, are entitled to receive a per diem allowance and travel expenses when they are engaged in board or commission business. The specific practice act or set of statutes governing your particular board or commission should be consulted in order to ascertain the applicable criteria in this area.

In most cases, board and commission members will be entitled to reimbursement for lodging, food and travel expenses incurred in connection with meetings and other legitimate business of the board or commission, such as authorized investigations. *Under state law, the allowance for these items is specified and cannot be increased to cover actual expenses.* Additionally, applicable statutes may provide a modest salary for board or commission members while engaged in official business. Again, the most common example of the concept of official business is the board's or commission's regular meetings.

In order to obtain reimbursement for expenses, board and commission members must fill out a standard claim form and include necessary receipts. If feasible, board or commission members might consider having their staff submit the completed forms at the conclusion of the board's or commission's meeting or other business. Following the appropriate procedures will ensure that you will be fully and properly reimbursed for your expenses. The general rules applicable to per diem and other expenses are found in SAM.

G. Purchasing.

Your board or commission office will need equipment, supplies, and services. Equipment such as photocopying machines or computer systems and office supplies must typically be purchased through the Purchasing Division of the Department of General Services. If the board or commission wishes to acquire a specific type of product that is not available through the Purchasing Division, it may be possible to do so, but the Purchasing Division must be contacted beforehand.

H. Independent contractor agreements.

Boards and commissions often use services of independent contractors such as accountants, lobbyists, private attorneys, and other professionals. Before attempting to procure such services, your board should review the practice act to determine authority to retain private contractors. Any questions should be directed to the board's legal counsel. Some boards and commissions are required by law to use the Attorney General's Office; others have the option of hiring private legal counsel.

There is a standard practice for obtaining the services of an independent contractor. Board of Examiners' rules require that all

contracts shall conform to the Model Contract Form Book published by the Attorney General. When a contract is negotiated by the board it must be submitted to the Budget Division and the Attorney General's office for approval by the Board of Examiners or its clerk.

I. Public relations and ethics.

You are a public officer under Nevada law and, therefore, must conduct yourself in accordance with the Nevada Ethics in Government Law set forth in NRS chapter 281.

When you are appointed to a board or commission, you are responsible for submitting a financial disclosure statement. You must also submit subsequent financial disclosure statements during your tenure as a board or commission member. Details relating to financial disclosure requirements are contained in NRS chapter 281.

The ethics provisions prohibit board and commission members from soliciting or accepting anything of value if doing so might influence the member to depart from the faithful and impartial discharge of his or her public duties. Similarly, a board or commission member may not use his position in government, or information obtained by virtue of such position, to secure any unwarranted benefit including a benefit for himself or another person, or any act that could be construed to only benefit the profession of which you are a member.

As a board or commission member, you must disclose any gift or loan, commitment to a private party, or significant pecuniary interest you have in any matter that is to be voted or otherwise acted upon by your board or commission. You must make such a disclosure before, or at least at the same time, the matter is acted upon. Disclosure must be made even if you abstain or do not participate in the vote or action. The fact that a board or commission member does have an interest in a matter does not necessarily mean he/she must abstain from participation in that matter. Questions regarding abstention should be addressed to the board's or commission's legal counsel.

In a state with a relatively small population such as Nevada, situations may arise in which a member of a board or commission that has licensing authority may be reasonably well acquainted with an individual seeking a license from the board or commission. In the event difficulties or controversies occur involving a licensing application, the board member would be well advised to consult the

board's legal counsel about his role in considering the application. Depending on the circumstances, it may or may not be appropriate for the member to abstain from participating in the matter.

It is likely that as a board or commission member, you will at some time be faced with situations that involve ethical considerations and the related legal requirements. If this happens, it is appropriate to disclose the matter to your commission or board and/or to consult with the board's legal counsel without delay. Disclosure, in the event of uncertainty, should be standard practice.

Unfortunately, some citizens, members of the media, legislators, and other governmental bodies perceive boards and commissions as agencies that serve specific private interests rather than public interest. This perception may be based on the fact that a board or commission usually consists of individuals who are engaged in the very business or profession under its jurisdiction. As a board member, you represent a government entity that serves the public. As a result, with the exception of areas in which there is a special need for confidentiality, it is advisable for your board to act in a forthright manner with individuals and entities from the private sector, as well as other governmental agencies.

In order to comply with the Open Meeting Law and the Public Records Law, the board must follow not only the letter but also the spirit of those laws. For example, a board or commission might consider furnishing copies of its meeting agendas to the news media, even though the Open Meeting Law does not require doing so unless requested.

Similarly, prompt response to a request for information will likely be met with sincere appreciation. If resources permit, the board or commission might even consider publishing a periodic newsletter reporting its current activities and other pertinent matters.

J. Executive director and/or executive secretary.

Many boards and commissions have authorization and resources to hire a part- or full-time executive secretary or director. Usually the board or commission hires this individual to manage its office and to carry out its policies on a day-to-day basis. The executive secretary or director is a key representative of the board or commission.

Practice acts under which boards and commissions operate commonly provide that the executive secretary is responsible for

keeping records of all board/commission proceedings, and properly disposing of board or commission revenues.

On review of your practice act, you will generally find that many functions of your board are not expressly delegated to the executive secretary or director. Yet, your board or commission may, as a practical matter, wish to have such functions performed by the executive. If performing a particular function (for example, issuance of licenses) is not expressly delegated by statute, it may, in some cases, be proper to delegate it to the executive secretary or director. However, to the extent that a function involves fundamental policy of the board or commission, requires exercise of judgment and discretion, or substantially affects an individual's legal rights, it cannot be delegated to the executive secretary or director. Such functions are simply non-delegable. If the executive director or secretary nevertheless improperly performs a function such as revoking a license, the board or commission may be subject to liability. For this reason, it is important to consult with legal counsel regarding proper delegation of board functions.

It is also important for a board or commission to give some direction to its executive secretary or director regarding areas of authority. Two methods commonly used to give such direction are written job description and administrative regulations.

Although the executive secretary or director is often a key representative of a board, it is the board or commission, with its members, that is ultimately responsible for enforcing statutes and regulations under its jurisdiction and for setting policy. This is a point that may be easily forgotten, because the executive secretary or director is often a full-time employee and the board or commission may only convene three or four times a year. Thus, it is recommended that the board select its executive secretary or director with care, and continually oversee his or her activities.

K. Legal services.

Depending on a number of factors, including availability of resources and specific needs of the board or commission, arrangements should be made for legal representation. Many, but not all, boards and commissions are required by statute to be represented by the Attorney General's office. If this is the case, the Attorney General will assign a specific deputy attorney general to advise and represent you. Keep in mind that the board is responsible for payment of the services of the deputy attorney

general. To the extent that resources permit and circumstances warrant, the deputy attorney general may attend board meetings. The deputy may also be utilized to represent the board or commission in litigation. In addition, the deputy may provide legal advice and guidance on a day-to-day basis as the need arises. You should encourage your executive secretary or director and other staff to seek legal assistance whenever it seems appropriate.

Depending on the statutes pertaining to the board, you may have the option of retaining private legal counsel instead of, or in addition to, utilizing the Attorney General's office. If you have this option, you may choose to retain private counsel to perform any or all of the services described above.

One function that can be performed only by the Attorney General's office is rendering Attorney General opinions. Although not binding on the courts, an Attorney General's opinion may be given more weight by a court than a legal opinion rendered by private counsel.

Every board or commission should make appropriate arrangements for access to legal representation as needed.

IV. OPEN MEETING LAW

Nevada's Open Meeting Law, NRS chapter 241, governs the meetings of all boards and commissions. The Attorney General's office publishes an Open Meeting Law Manual which is a good reference for board and commission members.

The Open Meeting Law primarily requires boards and commissions to hold their meetings in public, post and mail adequate notice of meetings at least three working days in advance, and keep written minutes of each meeting. The notice should comply with statutory requirements and legal counsel should review it for accuracy before posting.

Under the Open Meeting Law, the only exception to the requirement for an open and public meeting is when a public body holds a session to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. Such a person is entitled to written notice prior to the meeting pursuant to NRS 241.033. As is the case with open sessions, however, minutes should also be kept of closed sessions.

As a member of a board or commission, you should be aware that the Open Meeting Law applies any time a quorum (a majority of the membership of the board or commission) meets to discuss board or commission business, even in a casual or informal setting such as a meal or golf tournament. If you engage in discussion with other members without having followed the notice and other requirements of the Open Meeting Law, you will violate the law.

Violations of the Open Meeting Law, including even technical or seemingly unimportant breaches, can have serious consequences, including criminal prosecution or a court ruling declaring void all actions taken at the meeting where the violation occurred. Given the potential expense and inconvenience involved for not only the board but also the private parties attending the tainted meeting, all board members are urged to become familiar with and scrupulously follow the Open Meeting Law, as well as seeking the advice of legal counsel when the need arises in this area.

V. PUBLIC RECORDS LAW

Nevada's Public Records Law, NRS chapter 239, provides all public records must be open to inspection and copying unless otherwise made confidential by law. In some instances, there will be a specific statute that declares a record to be confidential. For example, in some but not all cases an investigation file for a license disciplinary matter may be confidential. If a statute clearly states a record is confidential, it is not disclosable (though it may be subject to subpoena). If it is clearly not confidential, it must be made available for inspection and copying at the request of the public. In the vast area in between, it is prudent to consult with legal counsel who can be guided by the application of a balancing test. Sometimes a record that is not specifically declared confidential in Nevada statutes may involve constitutionally protected rights of privacy for all or part of the record. Board and commission members should use their common sense and be cautious about records that contain personal, sensitive information. Otherwise, it is a good approach to presume, at all times, that the public has access to the contents of board files and records, and to treat the contents in a professional manner for that reason.

Destruction of official records is governed by record disposition schedules. Members or staff should be familiar with the board's or commission's record disposition schedule. The schedules set out a *minimum* time for preservation of official records in the custody of the board or commission, and provide a mechanism for preserving records with archival value.

Once a board or commission ceases to exist, the Division of Archives and Records within the Department of Museum, Library and Arts, must be contacted for proper disposal or transfer of official records.

VI. PUBLIC INFORMATION AND EDUCATION

The affairs of a board or other agency are public business and all meetings must be opened to the public. The boards are required to give adequate notice of meetings, time, and places, and take minutes of the meetings. (See Nevada Open Meeting Law Brochure.)

Although the actual decision of a board must be made at a public meeting, some discussions may be held in closed session if the statute allows. Legal counsel should always be advised before the board goes into closed session.

Written minutes of the public meeting should be taken and must be available within 30 working days. Meetings may be tape recorded instead of or in addition to written minutes. Minutes must be made available to the public and should accurately reflect proceedings of the meeting. For some hearings, a court reporter may be necessary to provide a legally accurate transcript.

VII. LEGISLATIVE PROCESS

The authority of boards and commissions is derived from the legislature. Similarly, the law that governs a profession, business or trade (its substantive law) is also primarily determined by the legislature. Accordingly, if a board or commission wishes to modify its authority in a particular area or believes that the substantive law under its jurisdiction should be modernized, clarified or otherwise changed, the board or commission must solicit action by the state legislature.

The Nevada Legislature convenes in January of every odd-numbered year and normally adjourns in June or early July. If the board or commission wants to seek legislative changes, the legislative agenda should be established at least six months before the legislative session begins. The legislative agenda should be drafted in the form of a Bill Draft Request (BDR). As a rule, BDRs must be submitted to the Department of Administration in the late summer preceding the legislative session. BDR forms may be obtained from the Legislative Counsel Bureau.

It is also possible to have bills submitted during the session, but this requires sponsorship of one or more specific legislators, and they have a limited number of BDRs at their disposal. It is recommended that the board or commission follow the procedure described above to ensure that its legislative package will be considered during the session.

Bills will typically be considered by a committee in each of the two houses of the legislature. A board should plan to have one or more representatives attend the committee hearings scheduled to consider its bills. If authorized by statute and if resources permit, a board or commission may be able to retain a lobbyist to speak on its behalf at committee hearings and represent it during the legislative session.

It is possible that an individual member may disagree with some aspect of the board's position regarding a matter before the legislature. This individual may even wish to make his position known to the legislature. For this reason as well as others, it is recommended that a board clearly define its position in relevant legislative matters before a legislative session begins and designate specific individuals, whether board members or lobbyists, to represent that position during the session. This will reduce the possibility of confusion on the part of legislators regarding the board's position and, in doing so, enhance the board's or commission's credibility.

A board representative appearing before a legislative committee in connection with a bill should be fully prepared to demonstrate why the bill should be passed. If there is written documentation containing statistics

or other information which supports a bill, such documentation should be made available to the committee members, preferably before the hearing.

The committee hearing is the critical forum in which bills are considered. Bills must be passed through committee before the full legislature votes on them. Presentation of testimony and documentation to legislative committee is critical. It should not be assumed that legislators have specific knowledge about a bill's subject matter or a board's area of jurisdiction. Consequently, the board representative should be prepared to educate as well as persuade the legislative committee members. The representative should also be available to legislators for consultation.

It may be prudent to point out to the legislative committee potential negative aspects of a bill, particularly with respect to a controversial bill, in order to protect the credibility of your board or commission. Additionally, a board attempting to secure new legislation should never assume that need for the legislation will be obvious and, therefore, take it for granted that the bill will be passed. Consequently, your board or commission should be fully prepared to support its proposed legislation and anticipate possible criticisms. If it appears that the legislature may not accept the legislation, the board may want to consider compromising its position by agreeing to some change in the proposed bill.

Aside from the board's or commission's own proposed legislation, there may be legislative bills sponsored by others that affect its official activities or jurisdiction. Your board or commission may wish to take a position in favor of or against such bills, taking into account potential effect on public health, safety, and welfare.

General information concerning the legislative process is available from the Legislative Counsel Bureau. In particular, a board should consult the Legislative Counsel Bureau for information on how to track or monitor the progress of its bills and other relevant bills through the legislative process. Tracking one's own bills is important, since it is not uncommon for bills to fall by the wayside in the course of a session. It may be wise to appoint a member of the board or commission or another representative to undertake this responsibility.

VIII. RULEMAKING/REGULATIONS

One of the most important and time consuming tasks of any licensing board is drafting regulations and enactment of these regulations through a many-tiered governmental review process. To understand this process, it is necessary first to understand the difference between a law and a regulation.

A law or statute is legislation that has been passed by the legislature and signed by the governor. Each board or commission has been created by such a law. The board's regulations, in contrast, are formulated by the board itself, not by the legislature. The board's authority to adopt regulations was, however, granted to it by the legislature in the law. Most laws authorize the board to formulate necessary rules and regulations not inconsistent with this act for proper conduct of the business or profession and as may be deemed necessary or proper to safeguard the interest of the public and standards of the profession.

It is important also to understand that this legislative ground of authority is strictly limited in two ways. First, the boards' regulation must be consistent with the law. Second, the regulations must effectuate provisions of the law. Consequently, the board cannot regulate outside the scope of the underlying statute which created it.

A board must address itself to identifying regulations needed to carry out the purpose of the law and then to draft, fine tune, and redraft proposed regulations. The process of developing regulations at the board level is painstaking and time consuming. The process of government review of the board's proposals is equally exhaustive.

The Nevada Legislature created the Administrative Procedure Act (APA), chapter 233B of NRS, to establish minimum procedural requirements for the regulation making process for all agencies of the executive department, except those expressly exempted from the chapter. Boards and commissions are subject to the APA.

Rulemaking procedures are designed to ensure fairness in board and commission procedures and provide an opportunity for citizen participation in the rulemaking process. If a board or commission has been given statutory authority to make rules, it is required to conduct workshops to discuss the general subjects to be addressed in a proposed rule with interested persons, give notice of its intent to act upon a rule, publish a draft or synopsis of the rule, allow the public to comment, and consider those comments before adopting a final rule.

A regulation will typically describe the organization, procedure, or licensure requirements of a board or commission. Regulations may also effectuate or interpret law or policy. Any action a board or commission intends to take that will address any of these issues in the slightest way may be subject to the APA.

A board must hold at least one workshop to discuss the general topics to be addressed in a regulation with interested persons. The workshops may be held before or after the language of the proposed rule has been drafted, but before a public hearing is held on the proposed regulation. At least 15 days in advance of the workshop, the agency must provide written notice to every person on the board's mailing list for receipt of notice of proposed regulations and such additional notice as will inform the general public and any business that may be affected by the proposed regulation. Written public notice of an intent to act upon a regulation and consider the views of interested persons at a public hearing must be given at least 30 days prior to such action. Details of notice requirements are contained in the APA. Before a board or commission takes action to consider an issue, publish a notice, or adopt a rule, legal counsel should be consulted.

At the same time the 30-day notice of an intent to adopt regulation is given to the public, proposed regulations must be submitted to the legislative counsel for review to ensure the language is clear, concise, and suitable for incorporation in the NAC. A board or commission should be aware that the draft submitted to the legislative counsel may not be returned in the same form or language. It is wise for the board or commission to review the approved text returned by the legislative counsel to make sure the meaning or effect of the proposed rule has not been changed. You should contact the legislative counsel to clear up any misunderstanding or confusion.

If the board or commission member has a conflict or continued misunderstanding with the legislative counsel, they should contact the board's legal counsel. Any proposal to revise the language of the regulation after it has been returned by the legislative counsel should again be sent to the legislative counsel for review; however, in most cases it is not necessary to wait for the results of that review before acting on the regulation. An exception would be where alterations to the proposed rule so transform it that a citizen reading the notice of intent to act on the rule would not have known that the transformed rule would be under consideration. In that case, rulemaking procedures should start again from the beginning.

The Nevada Constitution was amended by the passage of Ballot Question 5 in the 1996 general election to authorize legislative review of

administrative regulations and rejection of regulations which exceed an agency's authority. The Legislative Commission may suspend the filing of a permanent regulation after its adoption if it determines that: (1) In the case of a regulation purportedly required by federal law, the regulation is not required by federal law; (2) the regulation does not conform to statutory authority; or (3) the regulation does not conform to legislative intent. If the Legislative Commission objects to a regulation on one of these grounds, the agency may revise the regulation until the Commission withdraws its objection and the Director of the Commission files the regulation with the Secretary of State and notifies the agency of the filing. NRS 233B.0675. If the agency refuses to revise the regulation, the Commission may suspend the filing of the regulation until the 30th day of the next regular session of the legislature and notify the agency that the rule is not effective and may not be enforced. Before that date the legislature may, by concurrent resolution, declare that the regulation will not become effective and the agency may not enforce it. If the legislature has not so declared by the 30th day of the session, the Director will file the regulation with the Secretary of State and notify the agency of the filing.

For additional information about the rulemaking process, see *Administrative Rulemaking - A Procedural Guide* and the *Nevada Administrative Law Manual*, published by the Attorney General's office.

IX. INVESTIGATION, ADMINISTRATIVE HEARINGS, AND THE COURTS

A. Investigations and disciplinary procedures.

A board or commission generally has authority to investigate actions of persons who are licensed or otherwise permitted to engage in a particular profession, business or trade. If an investigation reveals a violation of the law that pertains to the jurisdiction of a board or commission, that body also typically has authority to take disciplinary action against the licensed party. In egregious cases, a board or commission may have the power to revoke a person's license to practice the trade, profession or business.

Investigation and the possible resulting disciplinary action against a licensee is a particularly sensitive area, since it involves the competing key interests of the state in protecting the public from incompetent or unscrupulous participants in regulated or licensed activities and of the individual in practicing his trade or profession and earning a livelihood without undue interference by the state.

Disciplinary procedures typically include these steps:

- ⑤ Investigation
- ⑤ Report

Options if there is insufficient evidence to go to hearing:

- * Close file
- * Continue investigation

Options if sufficient evidence to go to hearing:

- ⑤ If no or minor discipline to be imposed on licensee:
 - * Informal hearing
 - * Settlement decree
 - * Close file
- ⑤ More serious discipline to be imposed on licensee:
 - * Formal hearing
 - * Settlement agreement (investigator and deputy attorney general should attempt to negotiate a settlement acceptable to the entire board).

The interest in safeguarding public health, safety, and welfare is the primary purpose of a board or commission and the basis of its existence. It is imperative that boards and commissions vigorously

enforce statutes and regulations governing conduct of licensees under their jurisdiction. At the same time, however, boards and commissions must be conscientious in following legal standards established for conducting investigations and disciplinary actions.

These standards are embodied in statutes, regulations, and state and federal constitutions, and are designed to protect the interests of the licensed party. The licensed party must be afforded due process by the board or commission before discipline can be imposed.

In the sensitive area of investigations and disciplinary actions, board and commission members should scrupulously follow statutes and regulations. It should be kept in mind, however, that a particular statute or regulation may potentially conflict with state or federal constitutional requirements or might be applied in a manner that runs afoul of constitutional protection. Those who carry out investigations and disciplinary actions on behalf of boards and commissions should always work closely with legal counsel during *all* phases of the investigatory and disciplinary process.

Practice acts vary in terms of who is responsible for conducting investigations. Some acts provide that one or more members may conduct investigations. Others place this responsibility with the executive secretary or director, investigators hired or retained by the board, and/or legal counsel. Boards and commissions should review the statutory provisions of their act and follow them meticulously.

Board members who conduct investigations, whether they are authorized by statute to do so not, *may not participate as members of the hearing panel in the disciplinary proceeding*. Thus, board or commission members who are not authorized by statute should avoid becoming involved in any way with investigations. It is possible that as a member you may inadvertently learn facts about a case before it is brought before the board or commission. This could occur, for example, if the person under investigation informally contacted you, or if someone contacted you to complain about the conduct of a person licensed or regulated by the board or commission. If this occurs, you should promptly consult legal counsel in order to determine whether you should disqualify yourself from participating in the case.

Some boards or commissions have their own investigative staff. If your board or commission does not have its own investigator, you may contact the Investigations Division of the Attorney General's

office for assistance. Even if your board or commission does have its own investigative staff, you should consider contacting the Investigations Division in cases where there is a matter involving a potential conflict of interest, such as lodging a complaint against a board or commission member.

B. Hearings.

One of the board member's more serious responsibilities is a board disciplinary or application hearing which may impact a person's life and/or his ability to practice a profession. Boards hold hearings to obtain public comment on proposed regulations, to decide whether to grant a license to an applicant, or to resolve complaints against a licensee.

Complaints may be resolved by settlement following or during the investigation phase, or by means of a formal hearing if the licensee contests the charge. Resolution may consist of an informal hearing. In contrast, a formal hearing may result in serious disciplinary action such as suspension or revocation of a license and/or a fine. There is a difference in the conduct of the two types of hearings.

An informal hearing may be authorized by the board to attempt to resolve a disciplinary matter without proceeding to a formal hearing. An informal hearing is usually held to discuss resolution of a case proposed by the attorney prosecuting the disciplinary matter and the subject of the complaint, or to address matters that are not serious, or when the board's jurisdiction is questionable. After an informal hearing, the board decides on a course of action that may include dismissal of the complaint, dismissal with a letter of caution, authorization to enter into a settlement agreement, or another course of action.

If a formal hearing is authorized, the case is heard by the board and board counsel, or by hearing officers. A formal hearing is scheduled with the board members by the attorney prosecuting the action (usually the deputy attorney general assigned to the board). Another deputy attorney general may sit as board counsel and offer legal advice. In some instances, the deputy attorney general will sit as board counsel and the board may retain private counsel to prosecute the action. The board takes formal action by voting and making decisions. The decision must be based on evidence presented.

C. Evidence.

Evidence is matter that makes clear the truth of fact, persuades a tribunal of the existence of fact, or produces a just conviction of truth. It is further defined as any species of proof legally presented at a hearing through witnesses, records, documents, exhibits and tangible objects for the purpose of inducing belief in the mind of the finder of fact. The board or commission sits as the finder of fact in a hearing.

The word “evidence” includes all means by which any fact in dispute at a hearing is established or disproved. Any circumstance which affords an inference whether the matter alleged is true or false is evidence, and is commonly understood to be within the meaning of that term.

The object of evidence is to inform the finder of fact of the material facts which has bearing upon the issue in order that the truth may be elicited and that a fair determination of the controversy may be reached. The federal government and individual states have adopted rules of evidence to ensure that the truth be ascertained and proceedings justly determined.

Rules of evidence in Nevada are codified in NRS 47.020 through 56.020. Although rules of evidence are relaxed in administrative hearings, adhering to them will ensure hearings are conducted fairly. A listing of commonly used rules is included for your reference.

The word evidence is comprehensive, and encompasses both testimony and physical evidence. Legal evidence is not limited to oral testimony of witnesses, but includes documentary evidence such as public records, private writings, books of account, and other documents, or introduction of objects and exhibits.

③ “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015.

③ Evidence is classified according to whether it is circumstantial or direct.

* *Circumstantial evidence* is evidence of a series of facts other than the fact in issue, which leads to a permissible inference concerning the existence of the fact in issue.

* *Direct evidence* is evidence which, if believed, proves the existence of the fact in issue without inference or presumption; it is evidence which comes from one who speaks directly of his or her own knowledge on the main or ultimate fact to be proved.

③ *Offer of Proof* is a method by which evidence that is objected to may be shown to the trier of fact in order to assist in the decision. This allows the proponent to preserve the item offered for the record on appeal, if excluded.

③ *Judicial Notice* is a substitute for formal proof of a matter by evidence. The phrase “judicial notice” refers to the method by which a tribunal informs itself of a particular fact. The facts subject to judicial notice are facts in issue or facts from which they may be inferred. A judicially noticed fact must be:

* Generally known within the territorial jurisdiction of the board or commission; or

* Capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130.

D. Witnesses, evidence.

The term “witness” refers to one who, being present, personally sees or perceives a thing; a beholder, spectator or eyewitness. It is one who testifies to what he has seen, heard or otherwise observed.

A witness may not testify to a matter unless:

③ Evidence is introduced sufficient to support a finding that he has personal knowledge of the matter; or

③ He states his opinion or inference as an expert.

Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. NRS 50.025.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

An affirmation is sufficient if the witness is addressed in the following terms: "You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between _____ and _____, shall be the truth, the whole truth, and nothing but the truth." Affirmation shall be made by the answer, "I do." NRS 50.035.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to clear understanding of his testimony or the determination of a fact in issue. NRS 50.265.

③ Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may testify to matters within the scope of such knowledge. NRS 50.275.

③ Opinion by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. NRS 50.285.

③ Interpreters. Interpreters for handicapped persons and non-English speakers must be afforded to such witnesses. NRS 50.050 et seq.

③ Documentary and physical evidence proof is usually regarded as prima facie (a fact presumed to be true unless disproved by evidence to the contrary).

③ Authentication or identification required. Before evidence can be admitted, it must be identified and authenticated. In essence, this means that the proponent must satisfy the finder of fact that the matter in question is what it is claimed to be.

A copy of an official record or report or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, is presumed

to be authenticated if it is certified as correct by the custodian or other person authorized to make the certification.

③ **Credibility of witnesses.** The board sits as the trier of fact in its adjudicative capacity. The evidence must be considered and in doing this, the board can decide which testimony to believe and which testimony not to believe. A board may disbelieve all or any part of any witness's testimony. In making that decision, many factors should be taken into account, including the following:

- * Was the witness able to see or hear or know the things about which that witness testified?
- * How well was the witness able to recall and describe those things?
- * What was the witness's manner while testifying?
- * Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?
- * How reasonable was the witness's testimony considered in light of all the evidence in the case?
- * Was the witness's testimony contradicted by what that witness has said or done at another time or by the testimony of other witnesses or by other evidence?
- * If the defendant testifies, the testimony of the defendant should be judged just as any other witness's testimony is judged.

In deciding whether to believe testimony, remember that people forget things and a contradiction could be an innocent lapse of memory instead of an intentional falsehood, and that may depend on whether it has to do with an important fact or a small detail.

The weight of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. All evidence must be considered and testimony by a smaller number of witnesses on one side may have greater weight than that of a larger number on the other.

E. Findings of fact, conclusions of law, and orders.

A board issues findings of fact, conclusions of law, and order after a matter has come before it on formal hearing. The findings of fact should be clear and should set forth the basis for the determination made by the board. In some instances, the board may draft its own findings of fact, conclusions of law and order. In other cases, either its private counsel or the deputy attorney general may draft them for the board. However, the document should be approved as to its legality by the deputy attorney general before it is issued.

F. Role of the courts.

If the order of a board is adverse to the licensee's interest, he/she has recourse to file a petition for judicial review with the district court within 30 days after issuance of that order. The district court should give deference to the findings of fact, but may decide legal questions without such deference. The decision by the district court could then be appealed by either party to the Supreme Court of Nevada.

X. DUTIES OF CHAIRMAN

The chairman is not the decision maker. He is the group leader. A chairman's duties include calling the meeting to order, and leading and conducting the meeting. The chairman should not influence members in their beliefs or in their vote. He grants the floor to the person who properly addresses the chair. If more than one person requests the floor, the chairman decides who should have that privilege.

The chair decides if a quorum is present before the meeting is opened. A quorum is a number of persons specified in the statute as required to be present to hold a meeting. It is usually a majority of the members.

The chair attempts to draw everyone into the discussion, particularly when involved in important issues and attempts to have all sides presented.

The chair sets the ground rules for time allocation, discussion limits, time of adjournment, and keeps focus on the agenda.

The chair has the agenda adopted at the start of the meeting, and ensures motions are properly voted upon.

The chair will conduct hearings and may be called upon to make evidentiary rulings pursuant to legal objections.

In order to control the prolific talker or takeover type of person, the chairman could use the following techniques:

- ⑤ Be firm in order to give others a chance to participate and contribute. Say, "I appreciate your comments and would like to hear from others and will give them preference now."
- ⑤ When a conflict occurs, suggest that conflicting ideas help to present all viewpoints and help in resolving the matter. Insist and state that the conflict is between ideas and not between persons.
- ⑤ Keep the discussion on the subject. If persons stray from the subject or deal on personalities, be forthright and firm and rule them out of order. If necessary, recall the subject for them and insist that the discussion remain directly on that matter.

If ideas or problems are complicated and involved, the chair may:

- ⑤ Refer the matter to a committee for study, discussion, and recommendation. After the committee has completed its work, the

recommendations can be made to the entire group for action. The report can then be accepted, rejected, mended, or referred back to the committee for further study. A committee should be given a time limit for its work.

③ Use “buzz groups” (break the assembly into smaller groups) and, within a specified time limit, ask these groups to bring back their finding. A chairman and recorder are appointed. After the time has elapsed, ask each group for a report. Following this, the group may evaluate the findings and resolve the matter if a solution is requested. This technique works well if information and points of view are the main intents. Another related technique is to assign a different phase of the problem to different buzz groups. Following the reports, all these are put together to seek resolution to the issue.

③ Use a panel discussion. This provides an opportunity for presentation of different points of view. It can be made up of four to six persons who are experts on the matter or who knowingly have different viewpoints. In addition, an impartial moderator must be provided. The moderator facilitates the presentations and allows questions between panel members and, if time permits, from the membership or floor.

A good chairman must satisfy certain requirements:

- ③ Knowledge of basic parliamentary procedure.
- ③ Leadership ability.
- ③ Capability of being personable and ability to get along with people, yet at the same time being firm and orderly without endeavoring to be merely popular. The leader who seeks popularity usually fails.
- ③ Ability to handle critical and controversial issues.
- ③ Control of his or her emotions and convictions.
- ③ Impartiality while sitting as the chairman with exercise of common sense and good judgment.
- ③ Ability not to express ill will or negative thoughts about others openly.

XI. LIABILITY AND LITIGATION

We live in an extremely litigious society. This is a fact of life that applies not only to our personal lives, private employment, and business transactions, but also to government-related activities. As a member of a state board or commission, you must always keep in mind the potential liability your board or commission may face as the result of its actions. You also must be aware of the possibility that, as an individual board member, you may, under certain circumstances, be faced with personal liability and legal expenses involving your personal assets.

A board or commission and/or its individual members may be subject to liability in a wide variety of situations ranging from a traffic accident in which a board or commission employee negligently injures a third person, to a landlord-tenant or contract dispute, to an investigation or disciplinary proceeding in which the licensee alleges that the board or its representatives have violated his or her civil rights. Litigation against a board or commission, its members or employees is governed by NRS chapter 41.

Actions not taken in good faith may subject a board or commission, and even individual members, to liability. In this regard, it should be kept in mind that even if the board or commission has acted with a sincere desire to protect the public, it may not have acted in good faith, in the legal sense, if it has flagrantly ignored the law. In short, as board or commission members, you should at all times attempt to maintain your objectivity.

In order for a member or employee of a board or commission to avoid personal liability and legal expenses as the result of one's actions, the individual must act within the scope of his or her duties and in good faith. Causing investigation of an individual without an adequate factual basis and without complying with statutory and legal procedural requirements on the basis of a personal grudge against the individual is a stark example of behavior that would be characterized as conduct in bad faith and outside the scope of one's duties.

If a board or commission member or employee has acted in good faith and within the scope of his duties, but is nevertheless found liable in a lawsuit, he is entitled to be indemnified by the state. Additionally, if these criteria are met, the individual is entitled to receive legal representation from the state. In order to be entitled to indemnification and legal representation, the board member or employee must follow certain procedural requirements and cooperate with the state in his defense. The deputy attorney general who may represent the board or commission also has an obligation to serve the public and to ensure that requirements of due process and legislative mandates enabling the board or commission to exist are carried out.

It is, of course, possible for a board member or employee to engage in negligent conduct while acting in good faith and in the course of his official duties. In this situation, as explained above, the member or employee is immune from liability and legal expenses, and the state or the board or commission itself is responsible for payment of monetary damages to the injured party. Thus, in order to protect the board, members and staff must act with due care in carrying out their duties. There is no precise definition of the concept of "due care." In general, the best possible advice is that you should strive to carry out your duties in a reasonable, diligent manner. When faced with novel or difficult matters, you should consult legal counsel or seek other appropriate assistance. Consulting legal counsel prior to taking a particular action is especially advisable in view of court decisions which have held that reliance on the advice of counsel may, to some extent, insulate a board or commission from liability.

As board or commission members, you need to be particularly aware of certain areas of potential liability. Boards and commissions are frequently the target of civil rights litigation. Civil rights claims often stem from disciplinary proceedings and typically consist of allegations that the board, in taking disciplinary action, has in some way violated a licensee's right to a fair hearing. As noted previously, *to the extent that the board or commission has acted in good faith, and with the advice of counsel*, it will be in a strong, defensible legal position.

An area of potential liability that can easily be overlooked by boards or commissions involves anticompetitive actions taken in exercise of their authority. These actions include decisions which discourage competition within the profession rather than protect the public. Under some circumstances, such actions can expose boards or commissions to antitrust liability.

In general, licensing or other regulatory authority that many boards or commissions possess enables them to restrict competition in the marketplace. For example, prerequisites for practicing medicine obviously restrict entry into the field of medicine. To the extent that a board's conduct with regard to establishing or enforcing such prerequisites is based on clear statutory authority, it will probably constitute state action and not be subject to antitrust liability that would apply if private action were involved. However, given the fact that many regulatory actions have antitrust implications, it is good practice to solicit and heed the advice of legal counsel in this area.

If investigations and disciplinary proceedings are not conducted in compliance with the law, they may be the basis for imposing civil liability on the board or commission and potentially on individual board members themselves. As a simple example, if a board imposes disciplinary action, such as a license revocation, without giving the licensee adequate prior notice of the possibility of such action and an opportunity to defend himself, the board and/or its individual

members will be liable for violating the licensee's right to due process. This could involve monetary damages assessed against the board and/or its members, as well as vacating the tainted disciplinary sanctions.

It is also advisable to maintain clear, concise, and accurate records of actions taken by your board or commission, and its members or employees. When memories fade, the written documents or records may be the best evidence or only evidence of what occurred.